

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

**MARY BLOODSWORTH and
JERRY BLOODSWORTH,**

Plaintiffs,

V.

SMITH & NEPHEW, INC.
et al.,

Defendants.

CASE NO. 2:05cv622-D

MOTION BY SPAR MEDICAL, INC.,
TO DEEM STATE COURT PROCESS INSUFFICIENT

Pursuant to Federal Rules of Civil Procedure 4(a), 4(b) and 12(b)(4), defendant Spar Medical, Inc. ("Spar"), moves this Court to enter an order deeming service of a state court summons on Spar insufficient. As grounds for this Motion, Spar states as follows:

1. The Plaintiff filed this action in the Circuit Court of Montgomery County, Alabama on May 31, 2005.

2. On July 1, 2005, defendant Smith & Nephew, Inc. removed the action to this Court, at which time the state court's jurisdiction over the action ended. *See Maseda v. Honda Motor Co., Ltd.*, 861 F.2d 1248, 1254 (11th Cir. 1988) ("[A]fter removal, the jurisdiction of the state court absolutely ceases and the state court has a duty not to proceed any further in the case.").

3. Spar had not been served with a summons and complaint prior to removal, but a *state court* summons was issued to Spar by certified mail on July 19, 2005, eighteen days after the state court's jurisdiction had ceased. Spar was served with that state court summons on or about July 23, 2005. A copy of the state court summons issued to Spar is attached as Exhibit A.

4. Service of process after removal is governed by 28 U.S.C. § 1448, which provides:

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

5. Indeed, the *Federal* Rules of Civil Procedure apply to removed actions. *Fed. R. Civ.*

P. 81(c) ("These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal.").

6. When a defendant has not been served prior to removal of the case to federal court, the federal court should issue new process for that defendant compliant with *Fed. R. Civ. P.* 4, because "the state court process becomes null and void on the date the action is removed to the federal court." *Beecher v. Wallace*, 381 F.2d 372, 373 (9th Cir. 1967), *see also Dean Marketing, Inc. v. AOC International Ltd.*, 610 F.Supp. 149, 152 (E.D. Mich. 1985) ("Thus service of process must be accomplished according to federal procedure.").

7. The process issued by the state court to Spar after removal is insufficient because it did not comply with *Fed. R. Civ. P.* 4.

9. This failure of the Plaintiff to serve Spar with valid process must not be overlooked, as service of process is an "indispensable prerequisite to the court's jurisdiction to proceed." *Beecher*, 381 F.2d at 373. *See also Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 US 344, 344-45 (1999) ("Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant....Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure . . .").

WHEREFORE, Spar Medical, Inc. respectfully requests that this Motion be granted and that an order be entered deeming service of the state court summons on Spar insufficient.

s/ James C. Barton, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the above and foregoing with the Clerk of the Court on August 12, 2005, using the CM/ECF system, which will send notification of such filing to the following:

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